

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Communications Assistance for Law)	ET Docket No. 04-295
Enforcement Act and Broadband Access)	
and Services)	
)	RM-10865
)	

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

Lawful electronic surveillance under the Communications Assistance for Law Enforcement Act (CALEA)¹ is an indispensable tool used by law enforcement to help secure the nation from terrorism and criminal activity. United States Telecom Association (USTelecom)² member companies own a significant portion of the nation's communications infrastructure and are committed to continuing to work with law enforcement to secure the nation's economy, critical infrastructures, and key assets from terrorism and other criminal activity. For years, USTelecom members have cooperated with law enforcement in conducting legally authorized wiretaps by implementing intercepts on their networks. It is in this historical spirit of cooperation that USTelecom files these comments in response to the Federal Communication Commission's Further Notice of Proposed Rulemaking³ (Order and FNPRM) seeking

¹ Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as 47 U.S.C. §§ 1001-10 and 47 U.S.C. § 229).

² USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

³ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295 and RM-10865, First Report and Order and Further Notice of Proposed Rulemaking (rel. Sept. 23, 2005).

recommendations on whether to exempt small and rural facilities-based broadband Internet access providers⁴ from CALEA compliance.

SUMMARY

USTelecom believes a Commission-crafted exemption for small and rural service providers is unnecessary because CALEA itself provides clear and time-tested means of relief. Under sections 107 and 109(b) of CALEA, the Commission has authority to apply CALEA in a manner that allows appropriate time for the development of industry standards and provides relief from unreasonable burdens CALEA compliance may place on some small and rural providers. Specifically, USTelecom believes that the Commission has authority under these sections to grant temporary or permanent relief to small and rural broadband access providers who otherwise may not be able to comply with the Order and FNPRM.

DISCUSSION

Rather than create different compliance rules for different classes of providers, the Commission should provide relief through existing exemption procedures. The Commission asks whether it may create different compliance requirements for different types of providers. While the Commission may have legal authority under section 102(8)(C)(ii)⁵ to do so,⁶ a better approach is simply to rely on the Commission's existing statutory authority to give small providers the time and flexibility they need to implement CALEA. It is unnecessary for the Commission to create new exclusions for small and rural providers when it can provide them relief under current CALEA rules.

⁴ While the focus of these comments is on small and rural providers, nothing in here should prevent other providers from seeking the exemptions under sections 107 and 109 of the statute.

⁵ 47 U.S.C. § 1001(8)(c)(ii).

⁶ See Order and FNPRM ¶ 52.

The statute allows small and rural service providers the opportunity to extend compliance dates in order to take advantage of standards established by the industry and equipment manufacturers and to allow the market for broadband access service surveillance technologies to mature. Section 107(a)(1)⁷ of CALEA requires the Attorney General, in coordination with federal, state and local law enforcement agencies, to consult with appropriate communications associations and standards-setting organizations to ensure “the efficient and industry-wide implementation of the assistance capability requirements under section 103.” As a corollary to law enforcement’s obligation to participate in industry standards-setting, section 103(b)(1)⁸ of CALEA states that law enforcement is not authorized to require carriers to adopt any specific design of equipment, facilities, services, features, or system configurations. *See also* House Rep., 1994 U.S.C.C.A.N. at 3489, 3493-94.

The Commission’s past grants of extensions of time for CALEA compliance to packet-mode communications providers under section 107(c)⁹ were consistent with a desire to encourage the development of new technologies. Under 107(c), carriers obtained exemptions of up to two years if they demonstrated that CALEA compliance could not be reasonably achieved through application of technology available within the compliance period.¹⁰

Section 107(b) and (c)¹¹ also reflects Congress’s intent that the Commission should implement CALEA in a way that recognizes the burdens compliance may impose on carriers,

⁷ 47 U.S.C. § 1006(a)(1).

⁸ 47 U.S.C. § 1002(b)(1).

⁹ 47 U.S.C. § 1006(c)

¹⁰ 47 U.S.C. § 1006(c)(2). *See* Aug. 9, 2004 Order ¶ 97. The Commission has questioned whether section 107(c) covers only that equipment, facilities, or services installed or deployed before October 25, 1998.

¹¹ 47 U.S.C. § 1006(b).

including small and rural broadband access service providers. This section allows for reasonable time and conditions to comply with obligations and provides a means of petitioning for an extension of compliance deadlines. It provides that standards should be developed by “industry associations or standards-setting organizations,” and states that the Commission has a standards-setting role only if those industry bodies fail to fill their role. In that event, any standards the Commission issues must:

- (1) meet the assistance capability requirements of section 103 by cost-effective methods;
- (2) protect the privacy and security of communications not authorized to be intercepted;
- (3) minimize the cost of such compliance on residential ratepayers;
- (4) serve the public policy of the United States to encourage the provision of new technologies and services to the public; and
- (5) provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under section 103 during any transition period.¹²

Section 107(b) thus establishes the relevance of considering factors such as a standard’s cost-effectiveness, its effect on technology and service deployment, and whether carriers have a reasonable time to comply—all of which may suggest different requirements for small and rural carriers. Likewise, in this proceeding, the Commission has said that it intends “to afford all carriers a reasonable period of time in which to comply with, or seek relief from, any determinations that we eventually adopt.”¹³ What is reasonable for small and rural providers will depend on the industry standards-setting process and their individual situations.

USTelecom members look forward to using the products and services that will be offered by manufacturers and third party providers in response to the Order and FNPRM, but, until such

¹² *Id.*

¹³ Aug. 9, 2004 Order ¶ 91. *See also Memorandum Opinion and Order*, 13 FCC Rcd 17990, 18017-18 (1998).

time as standards have been developed, it may not be reasonably achievable for broadband access service providers to deploy non-standard solutions. Even after standards are in place, the Commission should grant small and rural providers sufficient time to take advantage of research and development and economies of scale once the major service providers have deployed appropriate CALEA-compliant technologies. These carriers are permitted to seek an extension under the current statute.

For those providers for whom final industry standards may not be “reasonably achievable,” the Commission should deem the service provider to be in compliance under section 109(b)¹⁴ of CALEA. This section provides the possibility of permanent relief from CALEA compliance for some carriers by permitting a carrier to petition the FCC for a determination that compliance is not “reasonably achievable.” If the Commission determines that compliance is not reasonably achievable for a carrier, the government must reimburse the carrier for retrofitting any equipment installed or deployed after January 1, 1995, or the carrier shall be deemed to be in compliance with CALEA.

USTelecom reiterates previous recommendations that, in evaluating petitions filed under section 109(b) and in order to avoid the imposition of substantial costs on telecommunications carriers and the possibility of costs not reimbursed by the government ultimately burdening consumers, the Commission should perform a cost-benefit analysis to determine what is reasonably achievable for small and rural carriers.¹⁵ USTelecom suggests that the Commission

¹⁴ 47 U.S.C. § 1008(b).

¹⁵ *See Communications Assistance for Law Enforcement*, CC Docket No. 97-213, USTelecom Comments (Dec. 12, 1997) at 12 (1997 USTelecom Comments). *See also* Nov. 8, 2004 USTelecom Comments at 16-17.

should rely on the definition of a “rural telephone company” under the 1996 Act¹⁶ and could consider the total number of interceptions per year in performing its cost-benefit analysis. The Commission also should consider the factors in the statute that affect consumers. These factors are the effect of compliance on rates for basic telephone service, the need to protect the privacy and security of communications, the effect on the nature and cost of the equipment, facility, or services at issue, the effect on carrier operations, and the financial resources of the carrier.¹⁷ The statute also permits the Commission to consider additional factors in making its determination.¹⁸ USTelecom repeats its recommendation that the Commission treat as an additional factor whether achieving compliance would be unreasonable for small and rural carriers because of the disproportionate economic impact on these carriers.¹⁹

CONCLUSION

In response to the question of creating exemptions for specific classes of carriers raised in the FNPRM, USTelecom urges the Commission to interpret CALEA in a manner providing a

¹⁶ Section 47 U.S.C.153(37) defines a rural telephone company as a local exchange carrier operating entity that—

A) provides common carrier service to any local exchange carrier study area that does not include either—

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

¹⁷ 47 U.S.C. § 1008(b)(1)(A)-(K); *See also* 1997 USTelecom Comments at 12 and Nov. 8, 2004 USTelecom Comments at 16.

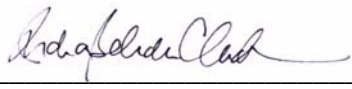
¹⁸ 47 U.S.C. § 1008(b)(1)(K).

¹⁹ *See* 1997 USTelecom Comments at 13.

measure of relief to small and rural carriers through established processes and the existing statute.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: 
James W. Olson
Indra Sehdev Chalk
Jeffrey S. Lanning
Robin E. Tuttle

Its Attorneys

607 14th Street, NW
Suite 400
Washington, DC 20005
(202) 326-7300

November 14, 2005